

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 05-24 ERIE

BARRY WAYNE LEWIS

SUPPRESSION HEARING

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Tuesday, October 25, 2005.

APPEARANCES:

CHRISTINE A. SANNER, Assistant United States
Attorney, appearing on behalf of the Government.

THOMAS W. PATTON, Assistant Federal Public
Defender, appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

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1 I N D E X

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3 WITNESSES: DIRECT CROSS REDIRECT RECROSS

4 FOR THE GOVERNMENT:

5 Keith Sorensen 4 15 38 --

6 Brian Gulnac 42 54 70 --

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13 EXHIBITS: IDENTIFIED ADMITTED

14 FOR THE GOVERNMENT:

15 Government Exhibit No. 1 11 75

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18 FOR THE DEFENSE:

19 Defendant Exhibit A 75 75

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1 P R O C E E D I N G S

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3 (Whereupon, the proceedings began at 10:00 a.m., on

4 Tuesday, October 25, 2005, in Courtroom C.)

5

6 THE COURT: This is the time we set for a

7 suppression hearing at Criminal No. 05-24. Are we ready to go?

8 MS. SANNER: We are, your Honor.

9 MR. PATTON: We're ready, your Honor.

10 THE COURT: Before we get going, let me just ask a
11 couple questions. First, I read the papers here. The
12 government's preliminary argument is, essentially, that the
13 reasonable suspicion analysis is unnecessary because it was a
14 consensual search. When I read your papers, it wasn't clear to
15 me what your position was on that. Are you conceding the
16 consensual nature of the stop?

17 MR. PATTON: No, your Honor. If you read our motion
18 to suppress, the motion to suppress argues as a ground for
19 suppression that there was not a reasonable suspicion to
20 justify a seizure, what we clearly believe is a seizure. That
21 when a police officer pulls in front of you, activates his
22 lights, I feel comfortable arguing --

23 THE COURT: You had to be otherwise it would make
24 the other argument moot. You're suggesting there was no
25 consent, there was no reasonable suspicion, is that right?

1 MR. PATTON: Correct.

2 THE COURT: That's pretty much what I thought. All

3 right, let's go.

4 MS. SANNER: Your Honor, the government would

5 request sequestration of the witnesses.

6 MR. PATTON: That's fine.

7 THE COURT: All right.

8 MS. SANNER: The government would first call Warren

9 County Deputy Sheriff Keith R. Sorensen.

10 THE COURT: Okay. Come on up here and give your

11 full name to my court reporter, spell it, and then my deputy

12 clerk will swear you in.

13 THE WITNESS: Keith, K-e-i-t-h, R., Sorensen,

14 S-o-r-e-n-s-e-n.

15 KEITH SORENSEN, GOVERNMENT WITNESS, SWORN

16 DIRECT EXAMINATION

17 BY MS. SANNER:

18 Q. Please state your full name for the record?

19 A. Keith R. Sorensen.

20 Q. And how are you employed?

21 A. Deputy Sheriff for the Warren County Sheriff's Office.

22 Q. How long have you worked with the Warren County Sheriff's

23 Office?

24 A. I've been with the sheriff's office for 24 years.

25 Q. What are some of the duties you have with the sheriff's

5

1 office?

2 A. Criminal investigations, serving civil processes.

3 Protection from abuse orders, court security, warrants.

4 Q. Were you on duty on March 28, 2005?

5 A. Yes, I was.

6 Q. What was your shift that day?

7 A. Three to eleven.

8 THE COURT: What time of day is that, is that 3 to

9 11 p.m.?

10 THE WITNESS: I'm sorry, 3 to 11 p.m.

11 BY MS. SANNER:

12 Q. Around 10 o'clock p.m. on March 28th, where were you?

13 A. I just finished doing a security check on the Domestic

14 Relations building that is owned by Warren County, at Hickory

15 Street.

16 Q. Were you in your patrol vehicle at that time?

17 A. Yes, I was.

18 Q. And where were you headed to?

19 A. I was headed north on Hickory Street, and stopped at

20 Hickory and Fourth because of a red light.

21 Q. It was 10 o'clock at night, it must have been dark?

22 A. Yes, it was dark, there were streetlights, headlights for

23 illumination.

24 Q. Did anything particular catch your attention at that

25 corner?

6

1 A. Yes, as I was stopped facing north on Hickory Street, the

2 two subjects walked in front of my patrol vehicle.

3 Q. So they crossed the street directly in front of your

4 patrol vehicle?

5 A. They crossed the street directly in front of my patrol

6 vehicle, and they were headed west.

7 Q. Did you notice anything in particular about the two men

8 passing in front of you?

9 A. Yes, the subject furthest from my patrol vehicle appeared

10 to be carrying an item and trying to hide it from my view.

11 Q. And what did that item appear to be?

12 A. Right away I thought it appeared to be a rifle.

13 Q. How big was it?

14 A. It was about three-feet long I'm going to say.

15 Q. And was it the size that made you think it was a rifle?

16 A. Yes.

17 Q. And you said he was trying to hide it from your view?

18 A. It appeared as though he was trying to hide it from my
19 view by using the person that was beside him, to his left, and
20 between him and my patrol vehicle as a shield.

21 Q. Was the rifle out in the open, was it wrapped in

22 anything?

23 A. It was in a bag and wrapped in a sheet or blanket of some

24 sort.

25 Q. And as he crossed the street in front of you, what can

7

1 you describe, anything unusual about his movements or how did

2 he move across the street?

3 A. They moved across the street walking, but the person

4 carrying what I thought was a rifle appeared to have a

5 stiff-arm, meaning that his arms weren't moving in a natural

6 manner, swinging back and forth, it appeared to keep his arm
7 stiff to his side.

8 Q. So his arms were in line with his body rather than
9 swinging?

10 A. Yes.

11 THE COURT: What did he keep stiff to his side?

12 THE WITNESS: What I thought was the rifle.

13 BY MS. SANNER:

14 Q. And did you follow their path as they continued across
15 the street?

16 A. No, the light turned green, I proceeded north. As I
17 proceeded north, I turned my head to the left where I could see
18 their backs, and again I could see the item, and again I
19 thought that it looks like a rifle. So I proceeded around the
20 block and radioed the Warren City Police and advised them that
21 I thought I saw the subject carrying a rifle walking down the
22 street. And I just thought it looked a little bit suspicious.

23 THE COURT: Keep your voice up, you're trailing off.

24 BY MS. SANNER:

25 Q. So you radioed for backup, essentially?

1 A. Yes, I did.

2 Q. And you didn't immediately pull over to stop the

3 subjects?

4 A. No, I did not.

5 Q. Instead, you continued through the intersection and then

6 proceeded around the block?

7 A. Yes, I did.

8 Q. There was a period of time where you would have lost

9 sight of the subjects?

10 A. Yes, there was a short period of time.

11 Q. You didn't immediately turn on your lights and siren and

12 pull them over?

13 A. No, I did not.

14 Q. After you proceeded around the block, did you again see

15 the two subjects?

16 A. Yes. Like I said, I radioed for the Warren City Police

17 and I proceeded down west on Fourth Avenue then, the direction

18 that I saw the subjects going last, and within a couple of

19 blocks I located the persons again.

20 Q. How many minutes would have elapsed, would you have

21 guessed?

22 A. I'm going to say maybe a couple minutes.

23 Q. From when you first sighted them until you went around

24 the block and saw them again?

25 A. Yes.

9

1 Q. When you saw them again, did it still appear as though

2 the subjects had a rifle?

3 A. Yes.

4 Q. When you saw them again, how fast were you going?

5 A. Just normal speed, maybe a little bit under the speed

6 limit. Because I was looking and trying to drive safe and

7 looking at the same time for the persons.

8 Q. When you drove around the block, were your emergency

9 lights on?

10 A. No, they were not.

11 Q. When you saw them and pulled over, did you turn your

12 emergency lights on?

13 A. Yes, at this point I turned my emergency lights on, I was

14 kind of in the intersection, being nighttime I didn't want

15 someone to come through and hit us. So I turned my lights on

16 as I exited my vehicle.

17 Q. Can you describe your approach to the two subjects?

18 A. Just a normal approach. I got out of the vehicle and

19 asked the subjects what do you got in the bag.

20 Q. And what happened?

21 A. Mr. Lewis told me it's a rifle, I found it in the

22 garbage.

23 Q. When you approached Mr. Lewis, did you have your weapon

24 drawn?

25 A. No, I did not.

10

1 Q. Did you show your badge?

2 A. I was wearing a uniform.

3 Q. Did you run across the street?

4 A. No, I did not.

5 Q. You just walked up to them and said hey, what do you

6 have?

7 A. Yes.

8 Q. Did he immediately hand you the rifle?

9 A. Yes, he immediately handed it to me and stated he found

10 it in the garbage, it was a rifle.

11 Q. And he offered the rifle to you?

12 A. Yes.

13 Q. Did you take the rifle?

14 A. Yes.

15 Q. Did you tell him that he was under arrest?

16 A. No, I didn't have any reason to arrest him at that point.

17 Q. Did you threaten him?

18 A. No, I did not.

19 Q. Did you try to control or block his movement when you

20 approached him?

21 A. No, I did not.

22 Q. And you didn't need to frisk him to take the rifle?

23 A. No, he handed it to me.

24 MS. SANNER: Your Honor, may I approach the witness

25 with the rifle?

1 THE COURT: Yes, you can without asking permission.

2 MS. SANNER: It's been made safe, your Honor.

3 BY MS. SANNER:

4 Q. I'm showing you what's been marked as Government Exhibit

5 1, do you recognize it?

6 A. It appears to be the rifle that Mr. Lewis gave me.

7 Q. And does it appear to be in the same or substantially the

8 same condition as when you saw it last?

9 A. Yes, it appears to be in good condition.

10 MS. SANNER: May I ask the witness to step down.

11 THE COURT: Sure.

12 BY MS. SANNER:

13 Q. If you could just take a hold of the rifle and show the

14 court how Mr. Lewis was carrying it when you first observed

15 him?

16 A. When I first observed him carrying the rifle --

17 THE COURT: Not to interrupt you, officer, but as

18 you were in your patrol car sitting at the intersection, are

19 you saying he would have passed from your right to your left,

20 is that right?

21 THE WITNESS: Yes, sir.

22 THE COURT: If you could do the same thing in front

23 of me to be as accurate as possible.

24 THE WITNESS: Okay. You're my patrol vehicle where

25 I'm sitting. Mr. Lewis was here, (indicating) --

12

1 THE COURT: The record is not going to pick that up.

2 THE WITNESS: Mr. Lewis was in front of me and

3 furthest away from my vehicle. And he had another person with

4 him, that was between him and my patrol vehicle to his left.

5 THE COURT: I'm not going to try to tell you how to

6 orchestrate this, we have another person, that is Ms. Sanner,

7 why don't you use her as a prop.

8 THE WITNESS: I am Mr. Lewis, she is Mr. Sumrow.

9 THE COURT: All right.

10 THE WITNESS: Mr. Lewis had the gun in his left

11 hand, and at first I thought the gun was butt up. But as he

12 handed it to me, it was he had been carrying it like the barrel

13 up. So he was carrying the rifle and he had a stiff-arm in

14 walking, trying not to move the weapon at all and using Mr.

15 Sumrow as a shield to block my view of what he was carrying.

16 THE COURT: All right. Let the record reflect the

17 officer walked from right to left in front of me with the

18 weapon in his left arm against his body, with the muzzle

19 pointed up. And Ms. Sanner was walking directly to his side
20 closest to me in lock step. All right.

21 BY MS. SANNER:

22 Q. When he turned the gun over to you, you were the only
23 officer on the scene?

24 A. Yes, I was the only officer present at that time.

25 Q. Did any other officers arrive?

13

1 A. Officer Gulnac from the Warren City Police Department
2 arrived.

3 Q. And did he arrive after Mr. Lewis handed the weapon over
4 to you?

5 A. Yes, he did.

6 Q. And when he arrived, what did you do with the weapon?

7 A. I handed it to Officer Gulnac and told him that Mr. Lewis
8 stated he found the gun in the garbage down the street.

9 Q. When Officer Gulnac arrived, was his gun drawn?

10 A. No, it was not.

11 Q. Did Mr. Lewis ever complain about the treatment he
12 received?

13 A. No, not to me he didn't.

14 Q. Did he say he had a permit to carry a rifle?

15 A. No, he did not.

16 Q. When Officer Gulnac arrived, did he then ask the
17 defendant who he was?

18 A. Yes. Officer Gulnac then took over the scene and he did
19 the questioning of Mr. Lewis.

20 Q. Did Mr. Lewis have identification with him?

21 A. No, he did not.

22 Q. Did Officer Gulnac then check to see whether or not the
23 gun was stolen?

24 A. Yes, Officer Gulnac called his station and they ran the
25 gun with the serial number, it came back I believe no record

14

1 found on the gun.

2 Q. Did Mr. Lewis want the gun back?

3 A. Yes. Mr. Lewis stated that he found it in garbage, he
4 was going to turn it into the police. If nobody came and
5 claimed it, he would like to have it back.

6 Q. At that point the gun was secured by Officer Gulnac in

7 the patrol vehicle?

8 A. Yes.

9 Q. And did Mr. Lewis at that point tell the officer, tell

10 you what his name was?

11 A. He stated his name was Barry Lewis. He told both of us

12 that.

13 Q. And then Officer Gulnac ran a check of Mr. Lewis's name?

14 A. Yes.

15 Q. And that turned up as an extraditable hit out in

16 California?

17 A. Yes.

18 Q. There was a warrant for Mr. Lewis's arrest?

19 A. I believe, yes.

20 Q. At that point Mr. Lewis was arrested?

21 A. Yes, Officer Gulnac then took him into custody.

22 MS. SANNER: Your Honor, I have nothing further for

23 this witness.

24 THE COURT: All right. Mr. Patton.

25 MR. PATTON: Thank you, your Honor.

1 CROSS-EXAMINATION

2 BY MR. PATTON:

3 Q. Officer Sorensen, did you write any reports detailing
4 your activities on the evening of March 28, 2005?

5 A. Yes, I wrote a brief report on it.

6 MR. PATTON: Your Honor --

7 THE COURT: Do you have it with you?

8 THE WITNESS: I do.

9 MS. SANNER: It was provided to counsel in
10 discovery.

11 MR. PATTON: We did not get it in discovery.

12 THE COURT: Well, you'll get it now.

13 MR. PATTON: May I have a moment, your Honor.

14 THE COURT: Yes.

15 BY MR. PATTON:

16 Q. Officer Sorensen, you were at about 10 o'clock in the
17 evening on March 28, 2005 traveling north on Hickory Street in
18 Warren, Pennsylvania, correct?

19 A. Yes, I was.

20 Q. On your screen there do you see this map?

21 A. Yes.

22 Q. Okay. So is it accurate to say you would have been

23 approximately right here, (indicating), at the intersection of

24 Hickory Street and Fourth Avenue?

25 A. Yes, sir.

16

1 Q. It's 10 p.m. at night?

2 A. Yes, sir.

3 Q. And dark?

4 A. Yes, sir.

5 Q. And as you pulled up, as you got to the intersection at

6 Hickory and Fourth Avenue, the light turned red, you had to

7 stop, is that correct?

8 A. Yes, sir. I had just left Domestic Relations, it's a

9 stones throw from Domestic Relations.

10 Q. And so as you were stopping at Hickory and Fourth Avenue,

11 you saw two men walking west on Fourth Avenue crossing in front

12 of your vehicle from right to left?

13 A. Yes.

14 Q. Across Hickory?

15 A. Yes, they crossed across Hickory on Fourth headed towards

16 Poplar Street.

17 Q. And they were walking side-by-side?

18 A. Yes, sir.

19 Q. And you saw one of the people or one of the men walking,

20 the one farthest from your car, walking and carrying an item?

21 A. Yes, sir.

22 Q. You didn't know what that item was?

23 A. I could not see the item as we see it here today. But I

24 did see him carrying an item wrapped in a sheet or blanket, it

25 appeared to me that it was a rifle.

17

1 Q. But you didn't see any of the rifle itself, did you?

2 A. No, sir.

3 Q. So you didn't know it was a rifle or not, did you?

4 A. No, I just suspected that it was.

5 Q. You suspected that based on the length of it?

6 A. Well, the length of it and I've seen rifles myself, you

7 know, I've seen rifles. But, you know, I couldn't see the

8 rifle.

9 Q. Not only was the rifle wrapped in a blanket, it was also

10 inside a garbage bag, correct?

11 A. Yes, it was partially in the garbage bag with part of it

12 protruding up.

13 Q. But the part protruding out was wrapped in a blanket?

14 A. It was in a blanket.

15 Q. At no time when the men were walking in front of your car

16 crossing Hickory Street, did you ever see a portion of the

17 rifle itself?

18 A. No, I did not.

19 Q. Since the two men were walking side-by-side, the

20 gentleman who was closer to your car to some extent interfered

21 with your ability to see the guy that was farther away from

22 your car, correct?

23 A. He was blocking some of my vision, yes.

24 Q. Due simply to the fact if two people are walking down the

25 street side-by-side and then cross in front of a car at an

1 intersection, just by shear physics of the situation the

2 gentleman closer to the car to a certain extent would block

3 your view of the person that's farther from the car, correct?

4 A. Yes.

5 Q. And the gentleman turned out to be Mr. Lewis, the one
6 farthest from your car, who was carrying this item, right?

7 A. Yes.

8 Q. He was carrying it up to his body, next to his body,
9 correct?

10 A. I would say beside his body.

11 Q. On the side closest to your car, correct?

12 A. Yes.

13 Q. He's walking in front of your car, he has this pressed
14 against the side of his body that is actually facing your car,
15 correct?

16 A. Yes.

17 Q. At no time did he try to switch the item over and put it
18 on the other side of his body, on the far side of his body from
19 your car, did he?

20 A. No.

21 Q. And if the item would have been pressed up against the
22 side of his body, Mr. Lewis's right side, you would have not
23 even been able to see the item, correct?

24 A. I don't know.

25 Q. It certainly would have made it harder for you to see it?

1 A. It probably would have made it difficult to see it.

2 Q. But he kept it on the left side of his body, the side

3 closest to your car?

4 A. Yes, sir.

5 Q. And after Mr. Sumrow and Mr. Lewis walked across your

6 car, they continued to head down Fourth Street or Fourth

7 Avenue, correct?

8 A. Yes, sir.

9 Q. And they're walking on what would be the south side of

10 Fourth Avenue, correct?

11 A. Yes, sir.

12 Q. On the sidewalk?

13 A. Yes, sir.

14 Q. And once they crossed Fourth Avenue, they're very quickly

15 out of your view into the darkness, correct?

16 A. I wouldn't say quickly, I mean there was streetlights, I

17 mean I could still see them.

18 Q. Well, the Elk's Club is right on the corner, the

19 southwest corner of the intersection of Hickory and Fourth

20 Avenue, correct?

21 A. Yes.

22 Q. And they're out of sight by the time they get even with

23 the Elk's Club?

24 A. No.

25 Q. They're not out of sight by the time they get even with

20

1 the Elk's Club?

2 A. No, as the light turned green for me to proceed, I looked

3 to my left. They were just clearing the crosswalk at that time

4 getting on the sidewalk. So -- I guess they were out of my

5 sight very quickly to that extent because I had proceeded north

6 again.

7 Q. So at this point Mr. Lewis has the item still on the left

8 side of his body?

9 A. Yes.

10 Q. As Mr. Lewis is walking west, correct?

11 A. Yes.

12 Q. As you proceeded north?

13 A. Yes.

14 Q. Is that correct?

15 A. Yes.

16 Q. So, now the rifle is now opposite of Mr. Lewis's body

17 from where you're located, correct --

18 THE COURT: Can I make a suggestion.

19 MR. PATTON: Sure.

20 THE COURT: You got that map in front of him, with

21 his finger he can trace the route.

22 BY MR. PATTON:

23 Q. Officer Sorensen, do you see the hand-drawn map that is

24 now on your monitor?

25 A. Yes.

21

1 Q. Are you able to read at least the street names?

2 A. I'm not sure, I think the middle one is Poplar. But I'm

3 not sure which one is -- as far as Hazel and Hickory streets.

4 Q. Would you describe the one farthest to the right?

5 A. Okay.

6 Q. The one the blue line is on?

7 A. Right.

8 Q. That is Hickory Street?

9 A. Okay.

10 Q. That one is Poplar?

11 A. That's Poplar.

12 Q. Poplar Street, that's in the middle of this map?

13 A. Yes, sir.

14 Q. The street that is on the left-hand side of the screen

15 would be Hazel, is that correct?

16 A. Yes, sir.

17 Q. That's an accurate representation of how the streets lay

18 out in Warren on Fourth Avenue?

19 A. Yes. They continue all the way down though the streets.

20 Q. Correct. But as you're traveling west on Fourth Avenue,

21 you hit Hickory Street, then you go farther west the next

22 street is Poplar Street, correct?

23 A. Correct.

24 Q. And then the next street farther west is Hazel Street?

25 A. That's correct.

1 Q. You can touch your screen and where you touch it, it will

2 input like a blue line on or put an arrow. Is it accurate to

3 say where I'm now drawing a blue line, that's where your car

4 was stopped at the red light?

5 A. Yes, sir.

6 THE COURT: You're going to have to say for the

7 record, Mr. Patton, where that is.

8 BY MR. PATTON:

9 Q. You're on Hickory Street south of Fourth Avenue, correct?

10 A. Yes, sir.

11 Q. Heading north?

12 A. Yes, sir.

13 Q. And you stop your car before the sidewalk because there's

14 a red light?

15 A. Yes, sir, before the crosswalk you mean?

16 Q. Correct, before the crosswalk?

17 A. Yes.

18 Q. Then Mr. Sumrow and Mr. Lewis walk in front of your car?

19 A. Yes, sir.

20 Q. I believe your testimony was that the light turned green

21 and you are able to then proceed north by the time Mr. Sumrow

22 and Mr. Lewis reached the west side of Hickory Street?

23 A. Yes, they were crossing in front of me, and I was
24 watching them when the light turned green, they probably had
25 reached --

23

1 Q. Can you touch the screen?

2 A. They probably reached this point here, (indicating), in
3 the crosswalk, sidewalk area, and I proceeded to go north.

4 Q. Okay. As you proceeded north, as you're trying to then
5 look at Mr. Lewis, the rifle is still on the left side of Mr.
6 Lewis's body, correct?

7 A. Yes, sir.

8 Q. Which would be on the south side of Mr. Lewis's body?

9 A. Yes, sir.

10 Q. And as you go north, when you get so that you're farther
11 north than Mr. Lewis is, his body then is going to block your
12 view of the rifle, what you think was a rifle?

13 A. At some point, yes, it would block my view, yes.

14 Q. At this point you still don't know if it's a rifle or if
15 it's not a rifle?

16 A. No, I just suspected that it probably was.

17 Q. But you haven't actually physically seen any part of a

18 rifle itself?

19 A. No, I have not.

20 Q. You just seen an item that was wrapped in a blanket that

21 was partially in a garbage bag that you think may be a rifle?

22 A. Yes.

23 Q. Now, you go up north on Hickory and then you make a left

24 on Rankin?

25 A. No, sir, I made a right onto -- I think I made a right

24

1 onto Fifth Street. And then went over to Liberty Street, which

2 it's not on this map here.

3 Q. Okay. So you went north one block to Fifth Street?

4 A. One block north to Fifth Street.

5 Q. You turned right, which would be to turn east, correct?

6 A. Correct.

7 Q. And went one block east?

8 A. I went one block east to Liberty Street from Hickory

9 Street.

10 Q. Okay. Then you would have turned right?

11 A. I then turned right onto Liberty Street.

12 Q. Which you would be heading south on Liberty?

13 A. On Liberty.

14 Q. Down to Fourth Avenue?

15 A. Down to Fourth Avenue again.

16 Q. And then turned right onto Fourth Avenue?

17 A. And then turned right, which would be west on Fourth

18 Avenue.

19 Q. So this has put you, you're now back on Fourth Avenue,

20 but a block further east than you were when you were sitting at

21 Fourth and Hickory?

22 A. Yes, sir.

23 Q. And then you start driving west on Fourth Avenue looking

24 for Mr. Lewis and Mr. Sumrow?

25 A. Yes, sir.

25

1 Q. And I believe you mentioned you were driving somewhat

2 fairly slow because you are trying to locate them again, is

3 that correct?

4 A. Yes, I'm not sure what the speed limit is on Fourth

5 Avenue, I was going probably under the speed limit or the speed
6 limit.

7 Q. You reached Poplar Street without seeing Mr. Lewis or Mr.
8 Sumrow, correct?

9 A. That's correct.

10 Q. As you were then driving west on Fourth Avenue between
11 Poplar and Hazel, as you were approaching Hazel, you saw Mr.
12 Lewis and Mr. Sumrow walking west on the sidewalk, correct?

13 A. As I was approaching Hazel?

14 Q. Yes.

15 A. Yes.

16 Q. As you got to Hazel Street, while you were traveling west
17 on Fourth Avenue, Mr. Lewis and Mr. Sumrow, while walking west
18 on the sidewalk, south of Fourth Avenue, they themselves were
19 approaching Hazel, getting close to Hazel, correct?

20 A. Yes, sir.

21 Q. They were getting very close to actually walking from the
22 sidewalk onto the road -- to walk across Hazel, correct?

23 A. Yes, sir.

24 Q. And so they're getting close to walking from the sidewalk
25 that runs parallel to Fourth Avenue, getting to Hazel and

1 actually getting to the point where the sidewalk ends and Hazel

2 Street begins, correct?

3 A. Yes, sir.

4 Q. And you make a left turn off of Fourth Avenue onto Hazel,

5 correct?

6 A. Yes, sir.

7 Q. And you pull your car up directly in front of where the

8 sidewalk that runs parallel to Fourth Avenue on the south side,

9 and you pull your car perpendicular to the sidewalk at Hazel,

10 correct?

11 A. I believe that my vehicle was probably, probably for the

12 most part in the crosswalk. I'm not sure it was completely in

13 the crosswalk. I want to say it was kind of at an angle.

14 THE COURT: Draw it, please.

15 THE WITNESS: I just did it.

16 THE COURT: You're one step ahead of me.

17 THE WITNESS: And that was the reason I activated my

18 lights, I didn't feel as though I was in an area where it was

19 safe, I thought I should activate my lights so I don't get

20 oncoming traffic hitting me or hitting us for that matter.

21 BY MR. PATTON:

22 Q. Oncoming traffic from where?

23 A. Well, from Fourth Avenue or from Hazel Street.

24 Q. Well, Hickory Street is wide enough so you can pull your

25 car up alongside the curb on the right side of the road, which

27

1 would be the southbound traffic lane, you could have stopped

2 your car there without creating any traffic hazard, correct?

3 A. Well, it's got a traffic light that stops the traffic.

4 Q. At the intersection of Fourth Avenue and Hazel is a

5 traffic light?

6 A. I thought you said Hickory Street.

7 Q. I apologize. Hazel Street is wide enough so that when

8 you turn left from Fourth Avenue onto Hazel, you can pull your

9 cruiser all the way over to the curb on what would be the west

10 side of Hazel Street and park your cruiser there so that it

11 would be legally parked and would not create any particular

12 hazards?

13 A. You could do that. But I'm not sure I did that.

14 Q. Well, if you pulled your car up all the way to the side,

15 just like any other car that is parallel parked along Hazel
16 Street, you wouldn't have to activate your emergency lights to
17 prevent someone from hitting you, would you?

18 A. Probably not if you pulled up as you're saying, directly
19 to the curb as anyone else would park. I'm not sure I did
20 that. As I said, I think my vehicle was at a slight angle. I
21 didn't take the time to just pull in and maneuver the vehicle
22 so it was legally parked.

23 Q. Why not?

24 A. Well, because I was getting out of the vehicle, I saw
25 them, I was getting out of the vehicle. I thought what I had

28

1 seen was a weapon, so I pulled my vehicle over, I activated the
2 lights for safety reasons, and asked Mr. Lewis what he had in
3 the bag.

4 Q. At the point you turn onto Hazel, Mr. Sumrow and Mr.
5 Lewis are almost on the street, Hazel Street, correct?

6 A. Yeah, I would say that they were on, just stepping onto
7 the street when I pulled up into the crosswalk.

8 Q. So they're stepping into the crosswalk, you pull your car

9 into the crosswalk, stop your car in the crosswalk and activate

10 your lights?

11 A. Yes, sir. As I said, I believe that my car was not

12 completely blocking the crosswalk, yes, it was in the

13 crosswalk, yes, I would agree with that.

14 Q. They would have had to walk, they could not have

15 continued walking in the crosswalk and made it across Hazel

16 Street?

17 A. Probably not. Not without diverting around my vehicle.

18 Q. They'd have to go out of the crosswalk to get around your

19 vehicle?

20 A. Probably.

21 Q. So you pull your vehicle into the crosswalk, at least far

22 enough so Mr. Sumrow and Mr. Lewis, as they're stepping into

23 the crosswalk, could not make it -- could not make it across

24 the street without walking around your car; and then you

25 activate your emergency lights?

1 A. I would say that's probably fairly accurate, yes.

2 Q. And at this point Mr. Sumrow and Mr. Lewis --

3 THE COURT: I want to get the sequence again, I
4 missed the question. When, in relation, let me just ask it
5 this way. When did you activate your overhead flashers?

6 THE WITNESS: As I pulled onto Hazel Street, I put
7 the vehicle in park and would have activated --

8 THE COURT: At the same time you were bringing the
9 vehicle to a stop?

10 THE WITNESS: Pretty close to the same time. I
11 believe it's on the same side of the vehicle, the emergency
12 activation switch and the gear shift.

13 THE COURT: I'm not familiar with the police cars
14 down there, but do you have, when you activate it, what kind of
15 lights go on on the police car, can you describe that for me?

16 THE WITNESS: It would be your standard red and blue
17 flashers, strobe type lights.

18 THE COURT: Is that on top of the police car?

19 THE WITNESS: Yes, sir, it's on the roof of the
20 police car.

21 THE COURT: All right, go ahead.

22 BY MR. PATTON:

23 Q. That's a marked sheriff's department patrol car, correct?

24 A. Yes, sir.

25 Q. It's marked prominently with Warren County Sheriff's

30

1 Department?

2 A. Yes, sir.

3 Q. When you activate the emergency lights, does that cause

4 your headlights to flash on and off?

5 A. I believe that it does, but some of the vehicles don't do

6 that because they've been having some problems with that. But

7 I believe it probably did.

8 Q. And on the light bar that's on the top of the car, okay?

9 A. Yes, sir.

10 Q. On the ends of the light bar, are there spotlights?

11 A. Yes, sir.

12 Q. So those spotlights are activated when you put the

13 overhead lights on?

14 A. Correct. No, I don't believe those activated. Those are

15 what we call alley lights. They have a separate push button

16 switch. The strobe lights is a toggle switch, you just push to

17 the right. The alley lights, which you're speaking of, you

18 have to push for the alley light, the alley light or the front

19 take-down lights, you have to push the button down, they have

20 push buttons.

21 Q. Mr. Lewis and Mr. Sumrow are stepping onto Hazel Street

22 in the crosswalk?

23 A. Yes, sir.

24 Q. You pull your car turning left off of Fourth Avenue into

25 the crosswalk on Hazel street, correct?

31

1 A. Yes, sir.

2 Q. And at this point Mr. Lewis and Mr. Sumrow are within 10

3 feet of your car?

4 A. I would say yes, 10 to 15 feet. They kept walking

5 towards my car as I was getting out.

6 Q. You put on your emergency lights?

7 A. Yes.

8 Q. And so when you step out of your vehicle, you're in full

9 uniform, correct?

10 A. Yes, sir.

11 Q. At that point they're very close to you, is this correct?

12 A. Yes, sir.

13 Q. And so now you're in front of them and you're standing
14 directly in front of them, correct?

15 A. Yes, sir.

16 Q. In the crosswalk?

17 A. Yes, sir.

18 Q. With your car directly behind you?

19 A. Yes, sir.

20 Q. With your emergency lights flashing?

21 A. Yes, sir.

22 Q. You ask them what's in the bag, you ask Mr. Lewis what's
23 in the bag?

24 A. Yes, sir.

25 Q. And it is after you put your lights on, exit your vehicle

32

1 and approach him and you're in full uniform and ask him that
2 question, that Mr. Lewis answers you and tells you what's in
3 the bag?

4 A. Yes, sir.

5 Q. And you got out of your vehicle because you wanted to

6 speak with Mr. Lewis and Mr. Sumrow, correct?

7 A. Yes, sir.

8 Q. And when you approached them, you thought maybe he's got

9 a rifle, correct?

10 A. Yes, sir.

11 Q. But you don't know if he's got a rifle?

12 A. I don't know that at that time, just suspect.

13 Q. And you were going to question them, at least Mr. Lewis,

14 about what the item was he was carrying?

15 A. Yes, sir.

16 Q. And you were going to get an answer from him?

17 A. Well, I assumed he would answer me.

18 Q. Because you just pulled your car in front of him and put

19 your emergency lights on and questioned him about what he's

20 got, correct?

21 A. I assumed he would answer me because I had asked him and

22 I had a police car, I would assume he would answer me.

23 Q. Did you have your police car with your lights activated,

24 which is your way of showing as a police officer, hey, I want

25 to speak with you?

1 A. I guess you could say that but, again, my reason for
2 putting the lights on was for safety sake. They were
3 approaching me, I didn't want a car to come along and hit us.
4 Yeah, I would say yeah, they would think he wants to talk to
5 us.

6 Q. After you are told the item in the bag is a rifle, do you
7 physically take possession of the item?

8 A. He handed it to me.

9 Q. Did you look to see what it was?

10 A. Yes.

11 Q. Did you identify it as a rifle?

12 A. Yes.

13 Q. And at that point some Warren city police officers
14 arrived on the scene?

15 A. One officer, Officer Gulnac arrived on the scene.

16 THE COURT: What was his name, sir?

17 THE WITNESS: Gulnac, I believe it's G-u-l-n-a-c,
18 but I'm not certain of that.

19 MR. PATTON: I believe that's the spelling, your
20 Honor.

21 THE COURT: All right.

22 BY MR. PATTON:

23 Q. Had you been handed the rifle prior to the time Officer

24 Gulnac shows up?

25 A. Yes, sir.

34

1 Q. How long had you had the rifle by the time he shows up?

2 A. A few seconds, 15, 20 seconds, I would think. It wasn't

3 very long.

4 Q. And you had called out before you stopped Mr. Lewis and

5 Mr. Sumrow and asked for some city units to come and assist

6 you, correct?

7 A. As I had crossed the intersection of Fourth Avenue from

8 Hickory Street, I had radioed what I had seen, and I believe it

9 was Officer Gulnac that answered me. I just asked him to head

10 that way in case that's what it was.

11 Q. After Mr. Lewis turned the rifle over, you wanted to do

12 some checking to find out what the story was with that rifle

13 before you decided whether you were going to let Mr. Lewis and

14 Mr. Sumrow move or not, correct?

15 A. I believe, I didn't really check on it, at that point I

16 turned it over, when Officer Gulnac arrived, I turned it over
17 to him, I said it is a rifle. And he radioed to check on what
18 it was, whether it was reported stolen or what.

19 Q. And while Officer Gulnac was doing that, you stayed with
20 Mr. Sumrow and Mr. Lewis, correct?

21 A. Well, I would say we were all standing fairly close to
22 together, within -- what you would you call a communication
23 distance or normal speaking distance.

24 Q. Did other officers besides Officer Gulnac then show up?

25 A. No, I don't believe so. I don't believe anybody else

35

1 showed up.

2 Q. But you and Officer Gulnac were not willing to let Mr.
3 Lewis and Mr. Sumrow leave until Officer Gulnac had called in
4 the serial number of the rifle?

5 A. Yeah, I would say that was accurate. I need to correct
6 one thing. I do believe there was a state trooper that did
7 show up, quite sometime later. It wasn't right away. He had
8 just heard the call and he had headed that way, also. I never
9 heard him call on the radio saying he was coming or anything

10 like that. But I do believe a trooper showed up, I wanted to
11 mention that.

12 Q. So your car is still sitting there with the lights
13 flashing, right?

14 A. Yes.

15 Q. And Officer Gulnac comes in a marked city patrol unit?

16 A. Yes.

17 Q. He's uniformed?

18 A. Yes.

19 Q. And he activates his lights when he gets there?

20 A. I don't know whether he activated his lights or not, to
21 be honest with you, I don't know. I would think he probably
22 did, I don't know if he did or not.

23 Q. So you and Officer Gulnac are standing, speaking with Mr.
24 Sumrow and Mr. Lewis, correct?

25 A. Yes.

1 Q. And you are keeping them there until you can call in the
2 serial number on the rifle to check to see if it comes back
3 stolen, correct?

4 A. Yes, because Mr. Lewis said he found it, he said he found
5 it in the garbage. Officer Gulnac was trying to figure out --

6 Q. He was trying to check to see if it was a stolen firearm?

7 A. Right.

8 Q. You were going to keep Mr. Lewis and Mr. Sumrow there
9 with you until that check was done?

10 A. I'm not sure what you mean by keep them there, do you
11 mean did we have them in custody?

12 Q. You weren't going to allow them to leave until Officer
13 Gulnac called in the serial number to see if the rifle was
14 stolen?

15 A. I'm not sure I really understand, they didn't ask to
16 leave. They walked over to the other corner of the street,
17 across from my patrol car, they walked over to here
18 (indicating).

19 Q. While you were still accompanying them?

20 A. While we were there. Because other people, other
21 pedestrians were walking to the area and they were talking with
22 them.

23 Q. Did Officer Gulnac ask questions of Mr. Lewis as to how
24 Mr. Lewis found the gun?

25 A. I believe he asked him where the gun came from.

37

1 Q. And this was after you had told Officer Gulnac that Mr.

2 Lewis had told you that he found the firearm in the trash?

3 A. I believe so, yes.

4 Q. And Officer Gulnac then asked Mr. Lewis himself where Mr.

5 Lewis found the firearm?

6 A. Yes, I think he was trying to get a more specific

7 location of where he found the gun. He just told me, you know,

8 I found it in the garbage and handed it to me.

9 Q. You guys hadn't had any reports of a firearm being

10 stolen?

11 A. I hadn't, I don't believe anybody did, no.

12 MR. PATTON: May I have a moment, your Honor.

13 THE COURT: All right.

14 BY MR. PATTON:

15 Q. Just for clarification, I don't know if we made this

16 clear, the garbage bag that the item was in, was a black bag?

17 A. I would say it was green and black, it was dark.

18 Q. It was dark, it was opaque, meaning you couldn't see

19 through it?

20 A. No, you couldn't see through it.

21 MR. PATTON: Those are my questions.

22 THE COURT: Ms. Sanner, do you have any redirect?

23 MS. SANNER: Just very briefly, your Honor.

24 THE COURT: Okay.

25 MS. SANNER: Thank you, your Honor.

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1 REDIRECT EXAMINATION

2 BY MS. SANNER:

3 Q. When you first saw the two men walking in the street,
4 what was it that really attracted your attention to them?

5 A. Well, they walked directly in front of my patrol car and,
6 again, I felt that he was trying to hide something from my
7 view.

8 Q. If the gun hadn't been concealed, if it had been out in
9 the open, would that also have attracted your attention?

10 A. I would think so at that time of night.

11 Q. Because of the time of night; what about the location
12 where you saw them?

13 A. Yes, it's within the city limits, I don't normally see

14 people carrying a gun at that time in city limits.

15 Q. Was it hunting season?

16 A. No.

17 Q. What about their body movement that also suggested that

18 they were trying to conceal the weapon from you?

19 A. Yes, like I said, I believed that Mr. Lewis was

20 attempting to use Mr. Sumrow as a shield to block my view, and

21 also the way Mr. Lewis, I call it stiff-armed, he wouldn't let

22 his arms move freely, he was just holding it stiff to his side.

23 Q. Walking as they were in lock step with the gun between

24 the two gentlemen, shielding the weapon not only from your

25 view, but also from passersby?

39

1 A. I would say so.

2 Q. How close were you to the police station?

3 A. I was a block from the police station. The Warren City

4 Police station -- I believe it's like down in this vicinity

5 here, (indicating).

6 Q. You were a block from the police station, you would

7 estimate?

8 THE COURT: Where is the police station, let's put
9 it that way?

10 THE WITNESS: I'm sorry.

11 THE COURT: Where is the police station located?

12 THE WITNESS: The police station is located on Third
13 Street and -- I'm sorry, let me retrace that, that's not
14 correct where it is. The police station is located on Third
15 Street, and it would have been, I'm trying to think here, it's
16 not where I made this mark, it's not on Poplar Street, it's
17 on -- I'm trying to get my bearings here. Could I see that
18 other map.

19 THE COURT: How often do you visit your police
20 station?

21 THE WITNESS: That's not my police station -- I
22 really don't go there too much, to be honest with you. I
23 believe the police station would have been at Third, actually
24 right between Third or Hickory and Poplar.

25 BY MS. SANNER:

1 Q. Did in fact other people approach during the encounter

2 with the defendant?

3 A. Yes.

4 Q. People were walking down the street?

5 A. Yes.

6 Q. And when you pulled over to speak with the defendant, did

7 you activate your siren, also?

8 A. No, I did not.

9 THE COURT: Excuse me one second. You were just

10 asked did other people approach walking down the street, you

11 said yes; who are those people, who did you mean?

12 THE WITNESS: The people that I know that walked

13 down the street were, one said she was Mr. Lewis's sister, who

14 he was supposedly living with. And one would have been Mr.

15 Sumrow's mother, I believe. And the other person was Sumrow's

16 sister.

17 BY MS. SANNER:

18 Q. As far as other people that were on the street, there

19 could have been a policeman in the area that might have seen

20 the rifle the defendant was trying to shield with his body?

21 A. Yeah, I just happened to be the one that happened to come

22 along.

23 Q. Did the defendant want to keep the gun?

24 A. Yes, he said he was going to turn it into the police

25 station. If nobody claimed it, he wanted to keep it.

41

1 Q. So when you checked to see if it was stolen -- well,

2 Officer Gulnac checked to see if it was stolen, the defendant

3 remained in the area where you were, he didn't ask to leave, he

4 asked to have the weapon back if no one claimed it?

5 A. Yes. And the police station is at 318 West Third. I'm

6 sorry, it is actually Liberty Street, it's not marked on here.

7 Liberty is this one here. So the police station is in this

8 corner there, (indicating).

9 Q. You didn't make any effort to detain the defendant's

10 movement, did you?

11 A. No.

12 Q. In fact, he crossed the street, continued across the

13 street after you approached?

14 A. Yes.

15 Q. And moved about in the area and talked to other people

16 that were in the area?

17 A. Yes.

18 Q. It was at that point he was arrested?

19 A. He was arrested by Officer Gulnac when Officer Gulnac
20 found out there was an active warrant for him from California.

21 MS. SANNER: I have nothing further, your Honor.

22 THE COURT: Anything else, Mr. Patton?

23 MR. PATTON: No, your Honor.

24 THE COURT: Officer, who asked him what his name was
25 and when was that question asked?

42

1 THE WITNESS: I believe -- I believe Officer Gulnac
2 asked him for his name and identification. He said he didn't
3 have any identification on him. Officer Gulnac arrived within
4 seconds after --

5 THE COURT: How was it determined what his name was?

6 THE WITNESS: He finally did say what his name was.
7 He said he didn't have any identification on him, it was in his
8 luggage, his luggage had been stolen. Officer Gulnac ran him
9 just based on what he provided Officer Gulnac.

10 THE COURT: Finally, did he give you his name before

11 or after you had run the check on the rifle?

12 THE WITNESS: After.

13 THE COURT: All right. Thank you, sir, you're

14 excused.

15 MS. SANNER: The government next calls Warren City

16 Police Officer Brian Gulnac.

17 THE COURT: You can do that in a few minutes after

18 we take a short break here.

19 (Recess from 10:56 a.m.; until 11:02 a.m.)

20 THE COURT: All right, come on up here to be sworn.

21 Would you give your full name to my court reporter and spell

22 it, please?

23 THE WITNESS: Brian Gulnac, G-u-l-n-a-c.

24 BRIAN GULNAC, GOVERNMENT WITNESS, SWORN

25 DIRECT EXAMINATION

1 BY MS. SANNER:

2 Q. Officer Gulnac, state your name for the record?

3 A. Brian Gulnac.

4 Q. And how are you employed?

5 A. I'm employed by the Warren City Police Department.

6 Q. How long have you been with the Warren City Police
7 Department?

8 A. Three years.

9 Q. What are some of your duties with the Warren Police
10 Department?

11 A. My duties include enforcing the crimes code, the vehicle
12 code. Conducting investigations, routine patrol, answering
13 calls to duty.

14 Q. Were you on duty on March 28, 2005?

15 A. Yes, I was.

16 Q. What was your work shift that day?

17 A. I was working 3 to 11.

18 Q. Is that p.m.?

19 A. Yes.

20 Q. At about 10 p.m. where were you?

21 A. I was on station at the Warren City Police Department.

22 Q. And what happened?

23 A. I was called by Deputy Sorensen, who stated that he
24 observed two males walking on Fourth Avenue and one of them
25 appeared to be carrying a firearm.

1 Q. Did he request backup?

2 A. Yes, he did.

3 Q. What did you do?

4 A. I basically asked him again where exactly on Fourth

5 Avenue he was. And then I went to his location.

6 Q. You got into your patrol vehicle and drove to where he

7 was?

8 A. That's correct.

9 Q. About how long did it take you to get from where you were

10 stationed, into the patrol vehicle, and then to the location

11 where you met with Officer Sorensen?

12 A. I was there within two minutes.

13 Q. And it was dark at 10 p.m.?

14 A. Yes.

15 Q. How was the area illuminated?

16 A. At the time I arrived there, it was very poorly

17 illuminated.

18 Q. What did you do?

19 A. I activated the take-down lights on top of my patrol

20 vehicle.

21 Q. Who did you see in front of you?

22 THE COURT: Excuse me, just for the record, what are

23 take-down lights?

24 THE WITNESS: Take-down lights are the two lights on

25 the top of the light bar that basically can be used for several

45

1 different things. If you're doing a traffic stop, you can

2 illuminate the back of the vehicle right in front of the patrol

3 vehicle. Of if you're talking to some subjects and it's dark

4 out, you can illuminate the area so other people, including

5 yourself, can see what is going on there.

6 Q. Did you have your siren on?

7 A. No.

8 Q. How many officers were there?

9 A. Myself and Deputy Sorensen.

10 Q. And Mr. Sorensen was talking with how many people?

11 A. Two.

12 Q. When you arrived and you approached the three people, did

13 you run, how did you approach?

14 A. I walked over to them.

15 Q. Did you have your weapon drawn?

16 A. No.

17 Q. Did you flash a badge?

18 A. No.

19 Q. What happened as you approached?

20 A. I spoke to Deputy Sorensen, who handed me a black plastic

21 garbage bag with a brownish-colored blanket, and inside of that

22 contained a 30-30 rifle.

23 Q. Where did you understand that weapon came from?

24 A. The defendant had stated that he found it in the trash.

25 First he told me he found it just up the street on Fourth

46

1 Avenue laying in the grass. Then he stated, well, I seen it

2 leaning up against a tree when I was digging through the

3 garbage, which I do regularly because you always find good

4 stuff in the garbage.

5 Q. When you first received the weapon, you understood he had

6 taken it from, he picked it up from the trash, is that right --

7 am I confusing you; when you first received the weapon from

8 Officer Sorensen --

9 A. Okay.

10 Q. Did you at that point know that the defendant's

11 explanation was he had found the weapon in the trash --

12 that's what Deputy Sorensen told you?

13 A. Yes.

14 Q. What did you do with the weapon as you held it?

15 A. As I held it and walked back towards my patrol vehicle, I

16 cleared the weapon, made sure it was not loaded. And it was

17 not. I advised my dispatch of the serial numbers and asked her

18 if she could check to make sure to see if the firearm was

19 stolen.

20 Q. Was the firearm stolen?

21 A. No.

22 Q. What did you do with the weapon after you learned it

23 wasn't stolen?

24 A. I secured it on the passenger side of my patrol vehicle

25 and locked the doors.

1 Q. Why did you secure it in your patrol vehicle?

2 A. Basically, it's lost property. He said that he found it

3 laying on the road, and the weapon itself was a nice looking

4 30-30.

5 Q. It was in good condition?

6 A. That's correct. And it had a scope on it, it looked like

7 a nice deer hunting rifle or something, I just couldn't imagine

8 somebody throwing it away. I figured somebody might have lost

9 it or something, I wanted to basically be able to give it back

10 to the owner when he called to report it stolen.

11 Q. You secured it into the vehicle and then you approached

12 Sorensen, Lewis and the third person that was there?

13 A. That is correct.

14 Q. At that point did you ask them for identification?

15 A. Well, I knew the third subject as Terry Sumrow.

16 Q. You knew him from past experience?

17 A. That's correct.

18 THE COURT: Could you spell the name, please?

19 THE WITNESS: S-u-m-r-o-w.

20 BY MS. SANNER:

21 Q. You knew Mr. Sumrow from past experience?

22 A. That's correct.

23 Q. You didn't have to ask him for identification?

24 A. No.

25 Q. You asked the defendant for identification?

48

1 A. Yes, I spoke to the defendant, I said do you have any
2 identification on you. He said no. I said have you ever had
3 any type of photo ID or anything issued by any of the states --
4 so we can run that through our computer and verify who he is.
5 He said no, I haven't. Then he come back and said well, I had
6 something a long time ago in West Virginia. I was like all
7 right. So I took his name, his date of birth, I relayed that
8 to the dispatcher, along with possibly check West Virginia to
9 see if he had any type of identification there.

10 Q. When you ran his name through dispatch, you learned he
11 had an extraditable warrant out of California?

12 A. That is correct.

13 Q. Did he ask for the gun back?

14 A. Yes, he had stated several times he said well, you know,
15 can I just hold onto it and if somebody calls for it, they can
16 just get a hold of me and take it back. I said well, no, I'd
17 rather keep it and secure it at our station.

18 Q. Did he give you alternate stories about how he found the
19 gun?

20 A. Yeah. Like I said, first he said he found it laying on
21 the ground along the road when he was picking through the
22 garbage. Then he said it was laying up against a tree out by
23 the garbage. He said he found it on Fourth Avenue. Which we
24 were standing at the corner basically on Fourth Avenue. So I
25 had looked up and down the road, and the only thing I seen was

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1 there was one white garbage bag, I believe there was two or
2 three black garbage bags. And they were sitting basically
3 further west than the defendant and Mr. Sumrow were. They were
4 walking in a westerly direction, they hadn't walked up to where
5 these garbage bags were yet. So I'm not sure if it was garbage
6 night in that area. If it was, there wasn't many people that
7 had their garbage out.

8 Q. When you asked him for his identification, was he under
9 arrest at that point?

10 A. No.

11 Q. Was he detained at that point?

12 A. No.

13 Q. Could he have moved about?

14 A. Yes. As a matter of fact and he did.

15 Q. He moved about during the course of the interview?

16 A. Yes, he did.

17 Q. Where did he go to?

18 A. Like I said, when we initially started, we were in the

19 area of Fourth and Hazel. He would have been on the east side

20 of that intersection. We were talking to him and Mr. Sumrow

21 there basically, in front of my patrol vehicle, right in that

22 area. Then another female had walked up, she was walking up

23 Hazel Street, come to find out when she got closer, it was Dawn

24 Sumrow, which is Terry's sister. So the defendant and Mr.

25 Sumrow walked across the road and went over and talked to her,

50

1 myself and Deputy Sorensen walked that way along with them.

2 Q. How long was it you were together?

3 A. From the initial time I got there, which was 2213, so it

4 would have been 13 minutes after 10, until I placed him into

5 custody, was 17 minutes.

6 Q. And you placed in custody because of the extraditable
7 warrant?

8 A. That's correct.

9 Q. It was not for possessing the weapon?

10 A. No.

11 Q. The weapon wasn't even stolen?

12 A. No, it didn't come back as stolen.

13 Q. He was never detained?

14 A. No. As I said he was walking around.

15 Q. Guns were not drawn?

16 A. No, at no time.

17 Q. He wasn't told he wasn't free to leave?

18 A. No.

19 Q. Did you sense that he wanted to keep the rifle?

20 A. Yeah, that's correct.

21 Q. He was waiting to see if you would return the rifle to
22 him?

23 A. Like I said, he stated several times that he wanted to
24 keep this, if anybody were to claim it, then they could get a
25 hold of him, he would give it back to them.

1 Q. But you kept the weapon?

2 A. That is correct.

3 Q. When you learned that an extraditable warrant existed,
4 you arrested and cuffed him at that point?

5 A. That is correct, and I placed him in the back of my
6 patrol vehicle.

7 Q. And you transported him to the Warren police station?

8 A. That's correct.

9 Q. When you got to the Warren police station, did you do an
10 inventory of the items that were on him?

11 A. Yes, I did.

12 Q. Did you keep any those items?

13 A. I kept two of the items. The first item was the 30-30
14 rifle. The second item, there was a small piece of plastic, it
15 was a piece of a pen, it was clear, it contained a white
16 powder. So I had kept that as well. I had field tested that
17 for cocaine. Which came back negative.

18 Q. So you field tested it for cocaine but it didn't end up
19 being cocaine?

20 A. I field tested it for cocaine, that's what it looked like

21 and it was not.

22 Q. The two items you ended up taking were that straw with
23 apparent white substance in it and the gun?

24 A. That's correct.

25 Q. And there were more items?

52

1 A. Yes, there were.

2 Q. What did they include?

3 A. Well, I believe he had three cents. There were several
4 tissues. He had a ton of tissues with him. They were in his
5 coat pocket, they were in his pants pocket. He had a
6 brownish-colored blanket. He a black garbage bag.

7 Q. Were those the items that the gun was wrapped in?

8 A. That's correct.

9 Q. They were inventoried, they stayed with his property?

10 A. That's correct.

11 MS. SANNER: I have nothing further, your Honor.

12 THE COURT: Before Mr. Patton asks you some
13 questions, I just have two. Where did you park in relation to
14 the other officer, Officer Sorensen's vehicle, when you pulled

15 onto the scene?

16 THE WITNESS: When I arrived, I came in off of
17 Fourth Avenue, I was traveling west. I pulled in, basically,
18 in the parking lane on the south side of the intersection,
19 turning my vehicle --

20 THE COURT: Could someone put that map up, please.

21 MR. PATTON: If he hits the upper left-hand corner
22 of the screen, it will take that stuff off.

23 THE COURT: If you mark it with your finger, you can
24 show me where you parked, if you would?

25 THE WITNESS: Okay. Basically, the location is

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1 Fourth and Hazel. That would be right here, (indicating).
2 I pulled in and basically parked right in this direction, with
3 my car angled towards the deputy's vehicle, who was basically
4 on Hazel Street.

5 MR. PATTON: He may be confused because he hasn't
6 seen this map before. I believe they were walking on the south
7 side of Fourth Avenue.

8 THE WITNESS: That's correct.

9 MR. PATTON: On this map the south side of Fourth

10 Avenue --

11 THE COURT: I'm sorry, let's do this. Rather than
12 me trying to piece this together, you now have the opportunity
13 to cross-examine. So go ahead.

14 MR. PATTON: Your Honor, first, Ms. Sanner has
15 provided a copy of Officer Gulnac's report. But it is
16 redacted. Under Rule 26.2, it states that "if the party who
17 called the witness claims that the statement contains
18 information that is privileged, or does not relate to the
19 subject matter of the witness's testimony, the court must
20 inspect the statement in camera."

21 THE COURT: Hang on a second.

22 MR. PATTON: It's under subsection (c).

23 MS. SANNER: Your Honor, I can probably shortcut
24 this. We're not claiming any type of privilege. I don't
25 believe he's entitled to a copy of Officer Gulnac's report, he

1 hasn't relied on it. But I did provide a redacted copy. The
2 sections that were redacted refer to the witness's statements

3 who is testifying on the defendant's behalf today. That's why

4 I redacted it. However, I am willing to give an unredacted

5 copy to the defendant.

6 THE COURT: This moves this right along, in the

7 absence of privilege, I was going to direct that anyways. Can

8 you give him an unredacted copy?

9 MS. SANNER: Yes.

10 THE COURT: Do you need a few minutes to look at

11 that report?

12 MR. PATTON: Yes, your Honor.

13 CROSS-EXAMINATION

14 BY MR. PATTON:

15 Q. Officer, at approximately 10 p.m. on March 28, 2005, you

16 were at the Warren City Police Department?

17 A. That's correct, I was in dispatch.

18 Q. You heard Officer Sorensen call in over the radio asking

19 for assistance from a city of Warren police officer?

20 A. That is correct. Normally I wouldn't have heard that

21 unless I was in either my patrol vehicle or in dispatch because

22 I don't have my radio on scan. So I was in dispatch. There

23 was a very brief time delay, but between the time that I

24 answered Mr. Sorensen or Deputy Sorensen on the radio, because

25 you have to hit a couple different buttons on our base station

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1 to be able to talk on the sheriff's channel.

2 Q. And Deputy Sorensen said that he had seen two males

3 walking west on Fourth Avenue, one of them carrying a rifle or

4 something that was sticking out of a bag?

5 A. That is correct.

6 Q. And he asked for assistance from some city of Warren unit

7 in helping him investigate that, correct?

8 A. Right.

9 Q. And you got clarification from Deputy Sorensen about

10 where on Fourth Avenue he had seen the males, correct?

11 A. That's correct, I verified where.

12 Q. So you could go out and assist Deputy Sorensen?

13 A. That is correct.

14 Q. Because your understanding is that Deputy Sorensen was

15 going to try find these people and stop them and question them,

16 correct?

17 A. It was my understanding that Deputy Sorensen wanted to

18 talk to these individuals, that's correct.

19 Q. He was calling for backup to help him in either finding
20 them -- or in questioning them?

21 A. Yes and no. There's several different ways to call for
22 backup. I mean somebody screaming over the radio hey, I need
23 help. Or hey, I'm looking for these guys, can you come out and
24 help try to find them, so can we talk to them or whatever.
25 There's the urgent hey, we got to get there. There's the hey,

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1 we got to get there.

2 Q. You got there within two minutes?

3 A. That's correct.

4 Q. But by the time you arrived at the scene, Deputy Sorensen
5 already had the two men stopped and was speaking with them,
6 correct?

7 A. He was talking to them at the time I arrived, that's
8 correct. I had seen Deputy Sorensen get there as I was going,
9 I seen Deputy Sorensen grab or get the black plastic bag and
10 the brownish-colored blanket from the gentleman that was
11 wearing a bluish-colored coat.

12 Q. Okay. Now, this happened at the corner of Fourth Avenue

13 and Hazel street?

14 A. The location I have listed is Fourth Avenue and Hazel.

15 Q. If you look on your screen, you see a hand-drawn map that

16 has Fourth Avenue and it has Poplar Street; but then it also

17 has Hazel Street, do you see that?

18 A. Correct.

19 Q. You said you came onto Fourth Avenue, is that correct?

20 A. I came onto Fourth Avenue yes, I went up Hickory Street

21 and turned onto Fourth. Our station is located at Third and

22 Hickory, which is one block down and two blocks over.

23 Q. So you were coming west on Fourth Avenue?

24 A. Correct.

25 Q. Okay. And you saw Deputy Sorensen pull his vehicle onto

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1 Hazel street?

2 A. I can't recall exactly if I seen him pulling onto Hazel.

3 But his vehicle was on Hazel, I seen him get out. I don't know

4 at what point I initially observed him. Whether I observed the

5 vehicle in motion or whether I observed him after he had put it

6 in park. I observed him exit the vehicle, go to talk to the

7 subjects and get the bag from the defendant. Who was wearing a
8 bluish-colored coat.

9 Q. Deputy Sorensen had parked the sheriff's patrol vehicle,
10 correct?

11 A. That is correct.

12 Q. He had his emergency lights activated?

13 A. Yes, that is correct.

14 Q. And so you then turn left from Fourth Avenue onto Hazel?

15 A. Now that I realize the map here, what I was kind of --

16 yeah, I turned left onto Hazel, but I was kind of in the middle

17 of Fourth Avenue and Hazel both. Right at the corner was about

18 the middle of my patrol vehicle, I was angled in between the

19 two. I wasn't actually on either one, I was kind of on both.

20 Q. Could you mark on the screen approximately where your
21 vehicle was?

22 A. I pulled in off of Fourth, my vehicle was sitting in that
23 direction, right in that area, (indicating).

24 Q. Is it accurate to say Deputy Sorensen's vehicle would
25 have been in this area, (indicating)?

1 A. That's correct.

2 Q. Where I just marked?

3 A. That's correct.

4 Q. Kind of parked what would be on the crosswalk of the

5 sidewalk running parallel to Fourth Street going across

6 Hickory?

7 A. Actually, I believe he was a little further south than

8 that. I'm trying to think. I'm not sure if that section of

9 Fourth Avenue has a fairly large grassy area between the

10 sidewalk or not. It was down away from the intersection a

11 little ways, so it has a large section of grassy area, then

12 he's probably this way off the sidewalk or in this area.

13 Q. On Fourth Avenue at least, I was there Sunday night, on

14 parts of Fourth Avenue there's a large grassy area between the

15 sidewalk and the actual curb of Fourth Avenue, correct?

16 A. Okay. I don't honestly know for sure. I believe that's

17 the way it is, I'm not a hundred percent sure on that.

18 Q. When you pulled up, you said you activated your take-down

19 lights?

20 A. That's correct.

21 Q. Those are spotlights that are up on the light rack that's

22 on the top of your vehicle?

23 A. That's correct, and point forward.

24 Q. Did you activate your flashing lights?

25 A. No, I did not.

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1 Q. When you approached Deputy Sorensen, he gave you the bag

2 with the rifle in it, correct?

3 A. That is correct.

4 Q. And indicated that Mr. Lewis had told him, him being

5 Officer Sorensen, that Mr. Lewis had found the rifle while

6 going through the garbage?

7 A. That's correct.

8 Q. You didn't accept that explanation at face value?

9 A. It's a nice rifle. Warren County definitely is known for

10 hunting, a lot of people in Warren County hunt. And for

11 someone just to throw a rifle that was kept the way it was, no,

12 I don't see where someone would throw that away.

13 Q. So you didn't accept that explanation as to how Mr. Lewis

14 came into possession of the rifle?

15 A. That's correct.

16 Q. You wanted to investigate a little bit further about what

17 was going on with that rifle?

18 A. Initially I wanted to make sure it wasn't loaded and

19 stolen. And then I wanted to know, yeah, where did you get it,

20 where did it come from.

21 Q. You wanted to keep Mr. Lewis around while you were

22 checking to see if it was stolen; if it came back stolen, you

23 were going to take him into custody for possessing a stolen

24 rifle?

25 A. I didn't tell him at anytime that he had to stay there.

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1 Q. I'm not asking what you told him, I'm asking what you

2 were thinking?

3 A. Well --

4 MS. SANNER: Objection as to relevance, your

5 Honor -- what he was subjectively thinking is not relevant.

6 THE COURT: It's an objective standard, I'll let you

7 ask the question, go ahead.

8 THE WITNESS: Well, you know, as I said, I wanted to

9 make sure it wasn't stolen. I guess if it were stolen, I

10 wanted to at least catch the person who had it.

11 BY MR. PATTON:

12 Q. And Mr. Lewis was the person who had it?

13 A. That's correct.

14 Q. So your intention was to run the serial number to see if

15 it was stolen, correct?

16 A. That's correct.

17 Q. If it was stolen, you were going to arrest Mr. Lewis?

18 A. First of all, I would have questioned him, I would have

19 asked him about it. If it came back stolen, I would have read

20 him his Miranda rights, questioned him about the weapon, then I

21 would have arrested him for possession of stolen property.

22 Q. When you were on the scene, you actually frisked Mr.

23 Lewis and Mr. Sumrow, didn't you?

24 A. What I did, I was talking to Deputy Sorensen. As I was

25 walking back, I said you know, we probably ought to check, make

1 sure these guys don't have any other weapons. They both said

2 go ahead, we don't have anything. We did a quick pat-down on

3 both of them and they didn't have anything.

4 Q. You were going to frisk them down whether they said go

5 ahead or not, correct?

6 A. You know, I always try and get consent. But for officer

7 safety, yeah, I probably would have.

8 Q. Let me understand the situation. You're at the corner of

9 Hazel and Fourth Street?

10 A. Fourth Avenue.

11 Q. Correct.

12 A. That's correct.

13 Q. Deputy Sorensen's marked police car is sitting there,

14 correct?

15 A. On Hazel, correct.

16 Q. With its lights flashing?

17 A. That's correct.

18 Q. And Deputy Sorensen is in full uniform, right?

19 A. Right.

20 Q. You have your marked vehicle, you pull up with the

21 take-down lights shining on Mr. Lewis and Mr. Sumrow, correct?

22 A. And Deputy Sorensen, correct.

23 Q. You're in full uniform, correct?

24 A. That's correct.

25 Q. Deputy Sorensen had taken the rifle from Mr. Lewis,

1 correct?

2 A. That's correct.

3 Q. You were checking to see if it was stolen, correct?

4 A. Uh-huh.

5 Q. You told Deputy Sorensen we need to pat these guys down

6 for safety?

7 A. I said we probably should, I didn't say we need to, I

8 said we should probably pat these guys down. At which time

9 they interjected go ahead, we don't have anything.

10 Q. You're just throwing out hypotheticals to Deputy Sorensen

11 maybe we should do this, maybe we should do that?

12 A. Basically, yeah, I think it would be a good idea to make

13 sure these guys don't have any weapons.

14 Q. You were going to do that?

15 A. That's correct. But we got their consent prior to just

16 doing that. They said go ahead.

17 Q. As they're standing there with police cars and police

18 lights, with emergency lights flashing, correct?

19 A. The lights were on, they were on for safety reasons.

20 Q. And then they were frisked, correct?

21 A. Yes, they were patted down.

22 Q. You didn't find any weapons?

23 A. No.

24 Q. And you called in the serial number from the firearm?

25 A. That's correct.

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1 Q. You had to wait a little bit of time before you had an

2 answer?

3 A. That's correct.

4 Q. You wanted to question Mr. Lewis a little bit more about

5 where he found the item, correct?

6 A. I did not at that time go over. I was standing at the

7 vehicle. I secured the firearm in the vehicle, I locked the

8 doors, basically, I got the response. I mean our dispatcher

9 unless she's really busy, she's fairly quick about everything.

10 This whole incident only took, from the time that I got there

11 at 13 minutes after 10 until I took him into custody, like I

12 said, it was 17 minutes. So during that 17 minutes, she had

13 checked to see if the firearm was stolen, checked to see if he

14 was wanted on NCIC and cleaned. So she did all of that fairly
15 quickly.

16 Q. When you're calculating the 17 minutes, your report on
17 the front page has a place where it says dispatched officer,
18 then has the date of 3/28/2005 and a time of 2213, is that the
19 time you got dispatched?

20 A. No, the time I got dispatched is going to be right
21 underneath where it says description. It's going to say date,
22 3/28/2005. Then it will say 2211. That's the time that I got
23 dispatched. I had arrived there at 2213, which is two minutes
24 after I was dispatched.

25 Q. Okay. Then where is it that says that the encounter

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1 ended at 2230?

2 A. In the comments section right underneath the location, it
3 tells the serial number of the firearm that I ran, the time I
4 seized that. Where he had claimed to have found it, and then
5 one in custody at 2230 hours. And then it also states the time
6 that I had cleared that location and was in route to our
7 station.

8 Q. Before you ran the serial number, did you personally ask

9 Mr. Lewis questions about how he came into possession of the
10 firearm?

11 A. No, I did not.

12 Q. After you got a call back saying the firearm was not
13 reported stolen or had not been reported stolen, you then went
14 and questioned Mr. Lewis?

15 A. Yeah, I wanted to ask him where he got it. If it's not
16 stolen -- I just wanted to see if he'd tell me that same thing
17 that Deputy Sorensen told me, that he found it in the garbage.
18 Like I said, you know, I don't see someone in Warren County
19 just throwing that away.

20 Q. Well, when you then questioned Mr. Lewis further, he
21 again told you that he found it in the garbage, correct?

22 A. That's correct. There was a little discrepancy as to
23 where in the garbage he found it, but he told me he found it in
24 the garbage.

25 Q. Just out of curiosity, at any time since March 28, 2005,

1 has anybody in Warren reported a 30-30 level action rifle being

2 stolen?

3 A. No, they haven't. Although, hunting season is getting
4 closer, it's possible that they might. They might have just
5 not noticed it missing up to this point.

6 THE COURT: When is hunting season down in your neck
7 of the woods?

8 THE WITNESS: Rifle season starts -- I'm trying to
9 think, it would be right after Thanksgiving. It would be the
10 Monday after, I believe. So about a month, little over a month
11 away, I guess.

12 THE COURT: Are you talking about deer season?

13 THE WITNESS: Rifle deer season, that's correct.

14 BY MR. PATTON:

15 Q. Is there anything in season for March?

16 A. Not that I'm aware of. Other than maybe small game,
17 but -- well, that's around turkey season, I believe, spring
18 turkey. Somewhere in the area of spring turkey and I believe a
19 little bit of small game.

20 Q. While you were asking Mr. Lewis these questions about
21 where he found the gun, had you at any point up to then asked
22 him who he was?

23 A. Yeah, I asked him what his name was. At one point he had
24 told me it was Barry Wayne Lewis and he gave me his date of
25 birth. I asked him if he had any type of ID through any state,

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1 whether it be Pennsylvania or somewhere else. He told me no
2 several times.

3 Q. After you put the rifle in your vehicle and got a call
4 back from your dispatcher that the firearm was not stolen and
5 you went back to speak with Mr. Lewis, where was Mr. Lewis at
6 that time?

7 A. At that point he's going to be -- he's going to be, well,
8 it would be the south side of the intersection of Hazel and
9 Fourth. He'll be to the southeast corner of Hazel Street.
10 It would be right here, (indicating).

11 Q. If you touch the screen --

12 A. Right in this area here, (indicating).

13 Q. Is Deputy Sorensen standing with him there?

14 A. Speaking to him there, correct.

15 Q. Still within your take-down lights shining?

16 A. That's correct.

17 Q. With Deputy Sorensen's car right there in front of him

18 with his lights activated as well?

19 A. I don't believe his take-down lights were activated, but

20 his emergency lights were activated.

21 Q. That's where you are asking Mr. Lewis questions, some

22 more questions about where he found the rifle, correct?

23 A. That's correct. Also, on the other side of the

24 intersection over here, he walked across because Dawn Sumrow

25 walked up this way, he walked over, over into here and was

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1 talking over there. Deputy Sorensen and I walked over with

2 him.

3 Q. When was that?

4 A. It was prior to me finding out he was wanted from

5 California. When I found out he was wanted from California,

6 there was a warrant issued from there, then I placed him into

7 custody, took him to my car.

8 Q. Was it prior to asking him questions about where he found

9 the rifle?

10 A. Throughout this whole thing we did. I mean, the whole

11 situation just didn't sound right.

12 Q. This is my question. Where was he standing at the time

13 you started asking him questions about where he found the

14 rifle?

15 A. When we started?

16 Q. Yes.

17 A. He was in between both patrol vehicles.

18 Q. You had asked him some questions about where he had found

19 the rifle, you then went to call in the serial number, correct?

20 A. That was the first thing when I got there. Deputy

21 Sorensen handed me the rifle, I cleared the rifle, walked back

22 to my patrol vehicle, called in the serial numbers. Placed the

23 firearm in the front seat of my patrol vehicle and locked the

24 doors. Got the response that it was not stolen. Then I walked

25 back.

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1 Q. During the entire time the events you just described

2 transpired, Mr. Lewis is standing where you had marked on the

3 map, on the southeast corner of Fourth and Hazel, correct?

4 A. That's correct.

5 Q. Where he was, basically, where he was when you pulled up?

6 A. That's correct.

7 Q. And that's where he was standing while you were asking,

8 when you came back from your vehicle and then started asking

9 him some more questions about where he had found the rifle?

10 A. That is correct.

11 Q. And he gave you the same answer, saying that he found it

12 in the trash, correct?

13 A. Yes, the location was different, but finding it in the

14 trash is the same.

15 Q. He's still standing in the same location?

16 A. That's correct.

17 Q. You also ask him his name, correct?

18 A. That's correct.

19 Q. While he's standing at the same location?

20 A. Right.

21 Q. Then you call in his name?

22 A. That's correct.

23 Q. Why did you call in his name?

24 A. Check for local wants and warrants.

25 Q. And what were you going to do if a warrant came back?

1 A. Take him into custody.

2 Q. You wouldn't be able to take him into custody if you let
3 him walk away and he had disappeared while you're waiting to
4 get the results of a warrant check, correct?

5 A. Yes, but he didn't.

6 Q. You weren't going to let him if he tried to, were you?

7 A. I didn't tell him that he couldn't. As I said, as far as
8 what I would have done if he started walking away, I may have
9 said, hold on a minute, but he wasn't concerned with leaving.
10 He wanted to get the firearm back, he was staying there to see
11 if I would give it back. I told him initially it's basically
12 lost property. I'm going to keep it, I'm going to secure it.
13 When the owner or if the owner calls in and requests or reports
14 it stolen, then I'm going to return it.

15 Q. After he had given you his name, he walked across Hazel
16 Street?

17 A. That's correct.

18 Q. You and Deputy Sorensen walked with him?

19 A. Him and Terry Sumrow actually walked across the road when
20 Dawn Sumrow was walking up the sidewalk. She was actually

21 walking north on Hazel Street. Then Deputy Sorensen and I just

22 walked over behind them.

23 Q. This was after he had given his name, after you were

24 waiting for the results of the warrant check?

25 A. We weren't over on the other side of the road for very

70

1 long. We were there for a few minutes, we talked to Dawn for a

2 few minutes, then our dispatcher said that he was wanted out in

3 California, so we took him into custody.

4 Q. Did you get that through the radio on your person?

5 A. This portable radio, (indicating).

6 Q. You were standing next to Mr. Lewis when that came back

7 saying he was wanted?

8 A. That's correct.

9 Q. When you frisked Mr. Lewis, he was standing over on the

10 east side of Hazel Street, is that correct?

11 A. We had not walked across the street yet, that's correct.

12 MR. PATTON: May I have a moment, your Honor.

13 THE COURT: Sure.

14 MR. PATTON: Those are my questions, your Honor.

15 THE COURT: Do you have anything else of this
16 witness?

17 MS. SANNER: Very briefly, your Honor.

18 REDIRECT EXAMINATION

19 BY MS. SANNER:

20 Q. Officer Gulnac, you said it took you two minutes to get
21 to the scene after receiving the call on the radio?

22 A. That's correct.

23 Q. Was there a faster way of getting there?

24 A. I probably could have ran there faster than taking a car.

25 I actually had to go out the back door of the police

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1 department, get in the car, start the car and go there. Where
2 if I were to walk over or run over, I could go out the front
3 door, it's two blocks away.

4 Q. So your sense was this wasn't an immediate arrest
5 situation that warranted you speeding to that scene?

6 A. No. At no time did I activate my lights or siren to get
7 there.

8 Q. The police station was about two blocks from the scene?

9 A. That is correct. On the map here you have Poplar Street,
10 then you'll have Hickory Street -- the police department is
11 right there. Just down one block, it would be Third Avenue.
12 It goes Second, Third, Fourth, Fifth, all away up to Seventh.
13 It would be at the corner of Hickory and Third.

14 Q. When you approached, you took the weapon from Officer
15 Sorensen and immediately did a check to see if it was stolen?

16 A. Immediately I checked to see if it was loaded. That's
17 the first thing I did, I wanted to make sure it wasn't loaded.
18 Then I checked to see if it was stolen.

19 Q. When you returned back to the scene, that's when you
20 asked the defendant who he was, and you then said maybe we
21 should frisk them?

22 A. As I stated, I was talking to Deputy Sorensen. I said,
23 you know, we probably ought to pat these guys down for officer
24 safety. Both of them said, go ahead, we don't have anything.

25 THE COURT: Answer the first part of the question.

1 When did you ask him who he was, if you remember?

2 THE WITNESS: It appears here that I asked him when

3 I got back over there what his name was. Then I spoke to him
4 for a few minutes. Then did the NCIC and clean check -- for
5 wants and warrants.

6 BY MS. SANNER:

7 Q. He remained in the area because he wanted the gun back?

8 A. I'm assuming that's why he stayed there.

9 Q. He asked for it back, didn't he?

10 A. Yes, several times.

11 Q. He asked if he could hold onto it until someone claimed
12 it?

13 A. That's correct, he wanted to keep it and have either them
14 or me contact him, he would return it to the owner if they
15 called for it.

16 Q. But you didn't arrest him for the weapon or anything like
17 that?

18 A. No.

19 Q. You didn't believe his story that he had just found it?

20 A. No.

21 Q. Do you see him in court today?

22 A. Yes, I do.

23 Q. And can you identify something that he's wearing?

24 A. He's wearing an orange and white jumpsuit.

25 MS. SANNER: Your Honor, may the record reflect the

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1 officer has identified the defendant?

2 THE COURT: It does.

3 MS. SANNER: I have nothing further, your Honor.

4 THE COURT: I have one question. You said you

5 pulled up, you couldn't quite remember whether Deputy Sorensen

6 was just stopping his vehicle or just getting out of his

7 vehicle, is that right?

8 THE WITNESS: That's correct. I don't know if the

9 vehicle was actually in motion or if he was just stopping and

10 getting out.

11 THE COURT: Did you pull up in relative close

12 proximity to his vehicle?

13 THE WITNESS: The actual distance I don't recall.

14 I would say it would be -- 5, 8, maybe even 10 feet. I wasn't

15 bumper to bumper by no means.

16 THE COURT: Based on the sequence of events, in

17 terms of you pulling up and observing him just stopping or

18 getting out of his car, would you have been visible to
19 pedestrians on the street there prior to the time that gun was
20 handed over?

21 THE WITNESS: I don't recall seeing them walking
22 down the sidewalk. I recall seeing the defendant in this case,
23 at that time it was the gentleman in the light blue coat,
24 handing the rifle to -- well, it was a bag at the time, I
25 didn't even know it was a rifle, to Deputy Sorensen.

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1 THE COURT: Where were you when that happened, I'm
2 trying to get the sequence of events?

3 THE WITNESS: I probably would have been, as far as
4 this map goes, obviously, it's not to scale or anything, I
5 would have been over in this area somewhere. I mean, I wasn't
6 there yet. I was getting there. So I would have been a house
7 or two away, able to see what was going on.

8 THE COURT: Did you have your lights on at that
9 time?

10 THE WITNESS: Just my headlights.

11 THE COURT: All right. Thank you, you're excused,

12 sir.

13 MS. SANNER: The government has no further
14 witnesses, your Honor.

15 THE COURT: You have one witness?

16 MR. PATTON: Yes.

17 THE COURT: How long is this person going to be?

18 MR. PATTON: I would say he's going to be at least a
19 half hour.

20 THE COURT: We're going to take a lunch break.
21 We'll come back and we'll start at 10 to one.

22 (Luncheon recess from 11:50 a.m.; until 1:05 p.m.)

23 THE COURT: Mr. Patton.

24 MR. PATTON: Your Honor, we do not have any
25 witnesses to put on. I did, though, after speaking with Ms.

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1 Sanner, I marked the handwritten map that we were referring to
2 throughout the hearing as Defendant's Exhibit A, I would ask
3 that be admitted.

4 THE COURT: That's admitted.

5 MS. SANNER: I would offer Government's Exhibit 1

6 into evidence as well.

7 THE COURT: Which one is that?

8 MS. SANNER: The gun.

9 THE COURT: Do you have a picture of it?

10 MS. SANNER: I can get one.

11 THE COURT: I'm not exactly sure how we're going to

12 ship that to the Third Circuit, can you take a picture of it?

13 MS. SANNER: We can do that.

14 THE COURT: Mr. Patton, do you have any need that

15 the actual gun be submitted as an exhibit?

16 MR. PATTON: No, your Honor.

17 THE COURT: All right. Just by way of post-hearing,

18 is there anything you want to tell me by way of conclusion,

19 legal as applied to the facts?

20 MS. SANNER: Just argument.

21 THE COURT: That's what I mean.

22 MS. SANNER: Yes. The government's position is that

23 this was a consensual encounter. Obviously, the Fourth

24 Amendment does not proscribe voluntary cooperation. In fact,

25 voluntary cooperation is an important tool of law enforcement.

1 A seizure doesn't occur every time an officer approaches to ask
2 a few questions. Even if their lights are on. One officer
3 approached the defendant. He approached on foot, he was in
4 public, on a city street, no guns drawn. There was no
5 intimidating movement, no show of force.

6 THE COURT: What about the car blocking his path
7 going across the street with its lights on, wouldn't that
8 suggest you can't at least go that way?

9 MS. SANNER: It might suggest that he had to go
10 around the police car to continue through the intersection,
11 which in fact is what the defendant proceeded to do. The
12 officer, as he was proceeding through the intersection, said
13 what do you have, and the defendant said it's a rifle and
14 handed it over. There was no stop, there was no frisk. It was
15 here, it's a rifle, and I was going to turn it into the police
16 station. The encounter here was consensual, and the Fourth
17 Amendment is not implicated.

18 The defendant doesn't argue that any passage of time
19 turned it into a stop. In fact, the testimony today showed
20 that the officer quickly discovered their primary concern was
21 that the weapon was not stolen. They didn't detain the

22 defendant then, the defendant hung around because he wanted to
23 keep the gun. He asked for it, he hoped to keep it, he
24 wondered if he could keep it until someone came to claim it.
25 The officers didn't believe his story. They didn't see that it

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1 was trash night and there were a lot of garage bags around,
2 maybe he did just pull it out of the trash. In fact, it
3 appeared that the garbage bags were pretty much farther up.
4 They smelled something funny, they asked the
5 defendant who he was, and he said he had no ID. No ID on him.
6 All his ID had been stolen and he could offer them nothing.
7 Finally he told them his name. And when he told them his name,
8 that's when the officers were able to perform a check on the
9 name and uncover the extraditable warrant out of California.
10 That's when the arrest happened.
11 As far as the east, west contradiction. Neither
12 officer's testimony contradicts anything in their reports.
13 They were responding in a moment, seven months later, to a
14 hand-drawn schematic by opposing counsel. Time has passed, I'm
15 sure the officers did not consider it relevant, whether it was

16 on the east side or the west side. What they considered at the
17 time was they had a guy walking down the street apparently
18 trying to conceal a gun.

19 Even if the encounter was not consensual, they had
20 reasonable suspicion to stop him. If the officer had not
21 stopped the defendant here, he would have been derelict in his
22 duties. He observed specific articulable suspicious behavior.
23 He saw the defendant carrying a rifle, close to his body,
24 walking straight armed, partially concealed in a bag, in a rug,
25 or actually fully concealed, it just like looked like a rifle.

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1 THE COURT: Let me ask you a question just
2 hypothetically. If instead of what he saw, that is the
3 defendant walking with a firearm positioned to his body in the
4 manner which the officer testified, what if the defendant had
5 been walking across the street with a gun in a typical cradle
6 position, your safety position, as you're just carrying it, it
7 wasn't in a bag at all, he was just carrying the gun and
8 walking across the street essentially for all the world to see.
9 All other circumstances being the same, same time at night,

10 whatever, would the officer have had reasonable suspicion to
11 stop him?

12 MS. SANNER: I believe so, even under those
13 circumstances. Because it's 10 o'clock at night, in a city
14 downtown, not hunting season, it would be reasonable to fear
15 that criminal activity might be afoot under those
16 circumstances. Here we have more than that. We have not just
17 a city street late in the evening in March, we have him with a
18 gun in a bag close to his body, using his companion as a shield
19 as they try to pass the officers.

20 There was reasonable suspicion based on that stop.
21 Looking at the whole picture, reasonable suspicion can be based
22 on entirety legal behavior, just like your Honor's example
23 would be. And great deference is given to the officer's
24 experience in law enforcement in that regard. I think it would
25 have triggered a concern even if the gun was, as you described,

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1 cradled in his hands, given the circumstances of the evening
2 situation and where he was in the city.

3 THE COURT: Would it matter if he was carrying it in

4 a regular gun case, just carrying it as it was intended to be
5 carried, but it was apparent it was a gun case, there was a gun
6 in it, would the officer have had reasonable suspicion to stop
7 him under those circumstances?

8 MS. SANNER: Again, you're not looking for a
9 consensual encounter?

10 THE COURT: I'm on the regs part of it now.

11 MS. SANNER: In that circumstance, again, there are
12 conceivable honest uses you could have had for carrying a gun
13 like that in the street. Maybe under those circumstances
14 where, given the number of rifles in Warren --

15 THE COURT: And the fact they have to be transported
16 somehow from place to place?

17 MS. SANNER: They have to be transported somehow,
18 I suppose they could need repaired or cleaned or something to
19 that effect, but it was late at night. No, I think that's a
20 little bit different. And clearly not what we had here. I
21 think it's the manner in which it was concealed, the way that
22 he used both his body and his companion's body in an effort to
23 shield it from the officer's view that really caused a
24 reasonable suspicion in this case.

25 Again, this is not like the Ubiles case, I'm

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1 guessing on how to pronounce that, where the officers were
2 responding to an corroborated anonymous tip. And then
3 proceeded to pat-down the person at issue. This is a situation
4 where the officer observed himself, hey, there's a guy walking
5 down the street with a gun, called for backup saying the same
6 thing. And when asked, the defendant offered him the gun.

7 THE COURT: How is this case like Valentine?

8 MS. SANNER: Valentine I think makes a good point in

9 that officers are allowed to ask questions of anyone, and gun
10 owners are no exception. I think that's the most important
11 thing that we can take from Valentine. The government's

12 position is notwithstanding where the car was or that the
13 lights were on, this was in essence a consensual encounter.
14 The officers would have responded differently if it were not
15 consensual. They would have had their guns drawn, they would
16 have said stop, police, that's not what happened in this

17 situation. They said hey, what do you have in the bag. That's

18 a consensual encounter.

19 THE COURT: I hesitate to ask you this, this is my

20 last question. To qualify the strength of your two arguments,

21 have you put most of your eggs in the consent basket or most of

22 your eggs in the reasonable grounds basket?

23 MS. SANNER: I would distribute my eggs equally

24 between the two baskets.

25 THE COURT: That was a good answer.

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1 MS. SANNER: I think that either applies. There was

2 ample reasonable suspicion in this case.

3 THE COURT: All right, let me hear from Mr. Patton.

4 MR. PATTON: Your Honor, I know Ms. Sanner's arguing

5 for her client the best she can. But to try and really argue

6 that this is a consensual encounter just flies in the face of

7 the facts.

8 THE COURT: I want to hear about the reasonable

9 grounds part of it?

10 MR. PATTON: Your Honor, the testimony you have is

11 that the officer saw an object. He didn't know what the object
12 was. He saw something wrapped in a blanket, inside a garbage
13 bag, with apparently part of the object still wrapped in the
14 blanket sticking out of the garbage bag. He doesn't even know
15 if it's a firearm or not. As far as was there some kind of
16 attempt to conceal it, number one, if you're walking down a
17 street with a companion and your companion happens to be closer
18 to a car in a intersection than you are, your companion is
19 going to block the driver's view of you. There is nothing
20 inherently suspicious in that. There is nothing suspicious
21 about two men who are walking together as they approach the
22 street, walking across the street together and continuing to
23 walk down the sidewalk on the other side of the street
24 together. I mean -- as far as trying to conceal the weapon
25 from Deputy Sorensen, according to his own testimony, Mr. Lewis

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1 is carrying the gun on the side of Mr. Lewis's body that is
2 facing Deputy Sorensen's car.

3 THE COURT: Let me ask you this. The upshot of his
4 testimony, as he viewed it, that it was his opinion -- he

5 didn't know, he suspected it might be a weapon. But whatever
6 it was, he thought there was a conscious attempt to hide it
7 from him, given the manner in which he was walking. Let's just
8 assume for the sake of argument that's all true. That there
9 was a conscious attempt. There's a line of cases that deal
10 with nervousness, or furtive behavior, insofar as it informs on
11 the question of reasonable suspicion. Put that into the mix,
12 is there reasonable suspicion?

13 MR. PATTON: There is not reasonable suspicion, your
14 Honor. I would say that what Deputy Sorensen had after Mr.
15 Lewis and Mr. Sumrow walked across the street, was a classic
16 example of inchoate and unparticularized suspicion or hunch.
17 Which the Terry case says is not sufficient to justify a stop.

18 Now, certainly if Deputy Sorensen wants to then engage in a
19 truly consensual attempt to talk with Mr. Lewis, he can do
20 that.

21 THE COURT: I steered you off that first point, but
22 let's go back to it. What did he do, in your view, that
23 rendered the initial encounter, the very initial encounter
24 where he met with this fellow, non-consensual, what were the
25 circumstances that made it coercive?

1 MR. PATTON: The testimony is that Mr. Lewis and Mr.
2 Sumrow were stepping off the sidewalk onto Hazel Street to
3 cross Hazel Street. Deputy Sorensen pulls the car into the
4 crosswalk, in his words, 10 to 15 feet in front of them,
5 activates the lights. It's a marked police car. He gets out
6 in full uniform and approaches them to question them. I would
7 submit that there is no reasonable person under those
8 circumstances that would believe that this is just a police
9 officer who wants to come up and see if you want to talk with
10 him or not. If it was truly going to be just a consensual
11 encounter, if that's all you want to do, there is no reason to
12 stop the car, number one, in the middle of the sidewalk; number
13 two, in the middle of the road, so that you have to turn the
14 lights on, so other cars can avoid you. The testimony is there
15 is room on Hazel Street, if Deputy Sorensen had chosen to do
16 so, that he could pull up, parallel park along the side of the
17 curb, therefore, not creating any kind of traffic hazard, he
18 wouldn't have to turn his lights on. He can get out of his
19 police car, and at that point walk up to Mr. Lewis and say hey,

20 you mind answering some questions. Or just say hey, what do

21 you got in the bag.

22 Under those facts, that would be a consent encounter

23 that someone could look at and say, okay, that's good police

24 work, he saw something that peaked his interest, so he's going

25 to check it out. It's not enough for him to stop, to forcibly

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1 stop somebody, but he can see if they want to talk. But

2 pulling your car into the middle of the road, directly in front

3 of the person, the pedestrians pathway, even as Deputy Sorensen

4 testified, they would have had to walk around his car, outside

5 of the crosswalk, to get to the other side of Hazel Street.

6 And if Deputy Sorensen is turning the lights on for public

7 safety reasons, that's not information that Mr. Lewis or Mr.

8 Sumrow have as they're walking down the street.

9 What they have, you have to view it as a reasonable

10 person, what a reasonable person sees, is a police officer just

11 pulled their car directly in front of us, in our path to stop

12 us from walking where we're walking, puts his lights on, which

13 is a show of his official authority.

14 I fail to understand how any reasonable person under
15 those circumstances would view that encounter as consensual in
16 nature.

17 THE COURT: So it's your position they were in
18 custody, he was in custody?

19 MR. PATTON: He was seized.

20 THE COURT: He was seized?

21 MR. PATTON: Correct.

22 THE COURT: Is it your position he had to be
23 Mirandized at that point?

24 MR. PATTON: Before they start asking questions that
25 they know would reasonably --

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1 THE COURT: Like what's your name?

2 MR. PATTON: Like where did you get the rifle. We
3 think the rifle is stolen, we're trying to find out where you
4 got it from.

5 THE COURT: But the critical fact that got the ball
6 rolling for the charge wasn't so much the rifle as it was his
7 identity?

8 MR. PATTON: I completely disagree with that. If

9 there had never been a warrant for Mr. Lewis out of California,

10 he still had a conviction that made it illegal for him to have

11 possessed a weapon, we'd be sitting right here. His name and

12 the fact there was a warrant for him out of California has

13 absolutely nothing to do with the federal charges --

14 THE COURT: It's a felon in possession, isn't that

15 the charge?

16 MR. PATTON: He has convictions other than the

17 California conviction that makes it illegal for him to possess

18 the weapon. So I strongly disagree.

19 THE COURT: It's his identity and, therefore, the

20 background check that would have revealed other convictions,

21 wherever they may have been, that made it illegal for him to

22 possess the rifle because he wasn't charged with possessing a

23 stolen rifle, right?

24 MR. PATTON: Because nobody can show that it was

25 stolen.

1 THE COURT: Okay.

2 MR. PATTON: The fact he hasn't been charged with
3 possessing a stolen rifle is the only reason he wasn't charged
4 with that is because -- nobody could prove, either the federal
5 government, nor Warren County, that the rifle was stolen. And
6 for our purposes today, the evidence that we're seeking to have
7 suppressed, number one, is the weapon itself. If he's seized
8 when Deputy Sorensen pulls the car up, right up in front of him
9 in the crosswalk, puts the lights on and comes out, then Deputy
10 Sorensen's questioning of hey, what's in the bag, Mr. Lewis's
11 response to that show of authority, that's a violation of his
12 Fourth Amendment. The firearm has to be seized. And all
13 statements after that are fruit of the poisonous tree.

14 THE COURT: Including what's your name?

15 MR. PATTON: Everything. Now, when you go to trial,
16 you can't ask that somebody's identity be suppressed because
17 there's case law talking about that fact. So all we can do in
18 this motion, we're asking you to suppress the physical item of
19 the firearm and --

20 THE COURT: The statements back at the police
21 station?

22 MR. PATTON: And the statements on the scene that he
23 found it in the trash, all of those statements.

24 THE COURT: If there's no gun, there is no charge,
25 right -- I mean, theoretically, if the gun is suppressed, it's

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1 done?

2 MR. PATTON: If the gun is suppressed, the
3 government is not going to be able to prove, number one, it's a
4 firearm, that it's traveled in interstate commerce.

5 THE COURT: I think I have the lay of the land.

6 MR. PATTON: Okay.

7 THE COURT: Unless there's one last point you want
8 to make?

9 MR. PATTON: If you can't win a motion to suppress
10 on the claim there's not reasonable suspicion in this case, you
11 can't win.

12 THE COURT: Well, you kind of put the ball in my
13 court there, haven't you, Mr. Patton. Do you have anything
14 else you want to say?

15 MS. SANNER: Yes, extremely short, your Honor. Just
16 that the concept that an encounter couldn't be consensual and
17 that the defendant would be seized because of the angle at

18 which the officer parked is extraordinary to me.

19 THE COURT: Let me ask you this. The test for
20 whether someone is seized, otherwise stated whether an
21 encounter was consensual, in an open space, as opposed to a bus
22 or a confined area, is whether or not that person would have
23 reasonably believed they were free to leave and/or not say
24 anything, just walk away?

25 MS. SANNER: Right.

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1 THE COURT: And you have to consider the totality of
2 the circumstances. Does it inform my decision at all that the
3 defendant would have seen this officer two minutes before, and
4 then would have concluded that he followed him for some period
5 of blocks, and then pulled in front of him when he was trying
6 to cross the street?

7 MS. SANNER: I think the testimony was that the
8 officer didn't follow him, he actually went around the block,
9 lost sight of him and then encountered him.

10 THE COURT: And caught up with him eventually?

11 MS. SANNER: As far as the freedom to leave, I think

12 another thing that would inform your Honor that is he kept
13 walking. When the officer pulled up in his car, if he was
14 detained or seized at that moment, you would think he would
15 have stopped. But no, he continued on his path to where he was
16 going to the other side of the street.

17 THE COURT: Would it have informed an objectively
18 reasonable person when the sister of his companion showed up
19 when he went to meet her or greet her he was accompanied by
20 both policemen, would have informed his decision as to whether
21 he was free to leave?

22 MS. SANNER: I think at that point there was a
23 decent amount of wandering about the area, what the testimony
24 was, from one side of the street to the other. People were
25 approaching. I guess if I was an objectively reasonable person

1 at that point and I felt the officer was following me, there
2 might be a sense of some seizure there. But, again, he was
3 never told that he was under arrest. He was always free to
4 leave. And the sense was that he was hoping to get the gun
5 back. If your Honor looks at this as reasonable suspicion and

6 considers him seized, then it would fly in the face of reason
7 to say that there wasn't reasonable suspicion to pull over the
8 car and stop the defendant the way that they did. This wasn't
9 an inchoate hunch. This was an articulated specific reason,
10 I think I've seen a guy trying to conceal a gun. Which he
11 relayed to the operator to try and get backup. So Officer
12 Gulnac heard him say, you know I'm following a guy, I think
13 he's carrying a gun three-feet long, next to his body, wrapped
14 up, and moving in a way that would conceal it, not only from
15 the officer, but also from any other passersby, blocks from
16 where the police station was. So based on his physical
17 movement, the time of day, the way the weapon was concealed,
18 clearly the officer had a particularized reason to stop him.
19 Again, a reasonable suspicion can be grounded on completely
20 legal activity. He could have had a weird shaped object and
21 maybe it wasn't a gun. But here what you look at is what the
22 officer thinks. Does he have reasonable suspicion and can he
23 articulate that. Here he not only could, but he did several
24 times.

25 THE COURT: All right.

1 MR. PATTON: If I could correct two factual issues.
2 The record does not say Mr. Lewis kept walking when Deputy
3 Sorensen pulled in front of them, turned the lights on, got out
4 of the car. Deputy Sorensen walked right up to him, asked
5 questions, this happened there on the east side of Hazel
6 Street. That some period of time after that is when the other
7 things were going on, is when Mr. Lewis's relative came up, he
8 walked over there. So the testimony wasn't that he got all the
9 way to the other side of Hazel Street because he gets
10 confronted when he's asked for the firearm.

11 The second thing, when the call went out and I asked
12 Officer Gulnac about this specifically, it's in our papers,
13 what Officer Sorensen says is I saw two males, one of them had
14 a rifle or something sticking out of a bag. It wasn't simply
15 he had a rifle.

16 THE COURT: All right. Well, I'm going to take a
17 look at this, get a transcript, I'm going to write an opinion
18 on this, do findings of fact and conclusions of law. I think
19 by way of papers I have everything I need from both you, I'll
20 try to get something out with some dispatch.

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22 (Whereupon, at 1:28 p.m., the proceedings were

23 concluded.)

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1 C E R T I F I C A T E

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

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12 _____

13 Ronald J. Bench

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